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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 4644 OF 2004

Dr.Aniruddha Malpani and anr. ... Applicants
versus

Dr.Jaywant Anant Khandare & anr.... Respondents

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Mr. A.V. Anturkar with Mr. S.B. Deshmukh and Ms.
Vinita V. Shastry, for the Applicants.

Mr. A.Y. Sakhare, Senior Counsel, with Ms. T.H.
Puranik, for Respondent No. 1.

Mr. S.R. Shinde, A.P.P., for Respondent No. 2.

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CORAM : A.M.KHANWILKAR, J.

23rd December 2004

P.C.:

01. Heard Counsel for the parties. Rule.
Rule made returnable forthwith by consent. Ms.
Puranik waives notice for Respondent No. 1. Mr.
Shinde, A.P.P., waives notice for Respondent
No.2. Petition taken up for final disposal
forthwith by consent.

02. The short question that arises in this petition is whether the Respondent No. 1 - Dr. Jayant Anant Khandare, Medical Officer of Health "A" Ward of Municipal Corporation of Greater Mumbai, was competent to institute criminal action against the Applicants in relation to offences punishable under section 22, read with Rules 6(2), 4(I)(ii) and 9(1), of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter referred to as "the Act"), as filed before the Court of Metropolitan Magistrate, 37th Court, Esplanade, Mumbai, being Case No. 34/S/2003. This question is agitated in the context of mandate of section 17 of the Act. The relevant extract of section 17 of the Act reads as follows :

"17. Appropriate Authority and Advisory Committee.

(1) . . .

(2) The State Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for the whole or part of the State for the purposes of this Act having regard to the intensity of the problem of pre-natal sex

determination leading to female foeticide.

(3) . . ."

03. The Applicants assert that no notification has been published in the Official Gazette appointing the Respondent No. 1 as the Appropriate Authority as is required by section 17 of the Act. It is submitted that it is only on such publication of the notification, the Respondent No. 1 can assume authority or acquire competence to initiate criminal action as the Appropriate Authority. Reliance is also placed on the mandate of section 28 of the Act, which postulates that no Court shall take cognizance of offence under this Act except on a complaint made by the Appropriate Authority concerned.

04. Whereas, according to the Respondent No. 1, he has already been notified as the Appropriate Authority and, therefore, the complaint as instituted by him was valid and permissible in law and the trial Court has legitimately acted on that complaint. Reliance was placed on the purported Notification dated 27th December 2001 issued by the Public Health

Department, Government of Maharashtra, in this behalf. It is, however, fairly accepted that this Notification has not been published in the "Official Gazette".

05. The question, therefore, is : In absence of publication of the said Notification in the Official Gazette, is it open to the Respondent No. 1 to claim that he has been notified as the Appropriate Authority within the meaning of section 17 of the Act ? In my opinion, the answer should be plainly in the negative. When the statute requires the Notification to be published in the Official Gazette and that act is not undertaken, the Notification issued in any other manner is of no consequence for the purposes of section 17 of the Act. A person is clothed with the power of the Appropriate Authority only upon publication of the notification in the Official Gazette, naming such person as such. In other words, publication of notification in the Official Gazette is the sine qua non. The contention pressed into service on behalf of the Applicants is supported by the

exposition of the Apex Court in I.T.C. Bhadrachalam Paperboards v. Mandal Revenue Officer, reported in (1996) 6 S.C.C. 634 (see paras 13 to 15). A priori, in law, the Respondent No. 1 was not competent to initiate criminal action; nor the Court could take cognizance of the complaint filed by person other than Appropriate Authority in view of the mandate of section 28 of the Act.

06. To get over this position, Mr. Sakhare contends that although the Notification in question was issued by the concerned Department, but the same has remained to be published in the Official Gazette due to some lapses which is being soon remedied as per the instructions already issued by the Secretary of the Family Welfare Department, Government of Maharashtra, to forthwith publish the said Notification in the Official Gazette. However, Mr. Sakhare is not in a position to point out any legal provision, which would permit the authority to appoint a person as Appropriate Authority with retrospective effect. Inasmuch as, the Notification in question will come into effect

only from the date of its publication in the Official Gazette. If it is so, the publication of the Notification in question in the Official Gazette in posterity can be of no consequence to decide the point in issue. So understood, the fact that steps are now being taken for publication of the subject Notification in the Official Gazette need not detain us. In the present case, suffice it to observe that, on the date of institution of the subject complaint by the Respondent No. 1 against the Applicants, no Notification published in the Official Gazette authorising the Respondent No. 1 to exercise that power was in existence.

07. Mr. Sakhare then contends that the Applicants have already carried the matter before the Apex Court against the decision of the Division Bench of this Court pertaining to the issue of "suspension of the licence" of the Applicants. It is, however, fairly accepted that in the matter pending before the Apex Court, being S.L.P.(Civil) No. 21471/2004, the issue is entirely different than the one raised in the present case, especially in the context of

authority to initiate criminal action under the Act. In the circumstances, pendency of that matter is of no avail to the Respondent No. 1.

08. In the circumstances, this petition should succeed in terms of prayer clause (a). Ordered accordingly.

09. It is, however, made clear that this decision is not an expression of opinion on the remedy as may be available to the Respondent No. 1 or any other authorised person after publication of the Notification in the Official Gazette. That aspect is left open.

(A.M.KHANWILKAR, J.)